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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CHRIS D. STOLTZFUS and IRMA H. STOLTZFUS, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CONVERSE MURDOCH
RICHARD E. POOLE
Counsel for Petitioners
350 Delaware Trust Building
Wilmington, Delaware 19801

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Chris D. Stoltzfus and Irma H. Stoltzfus pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 31, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court with respect to findings of fact and conclusions of law, printed in Appendix B hereto, *infra,* p. 11, is reported in 264 F. Supp. 824 (E.D. Pa. 1967); 67-1 U.S. Tax Cas. ¶9287; 19 AFTR 2d 854. The memorandum opinion of the District Court with respect to plaintiffs' motion for a new trial is unreported and is

printed in Appendix B hereto, *infra*, p. 18. The opinion of the Court of Appeals for the Third Circuit, printed in Appendix B hereto, *infra*, p. 21, is not yet officially reported but is unofficially reported in 68-2 U.S. Tax Cas. ¶9499; 22 AFTR 2d 5066.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 31, 1968. Rehearing was denied on September 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the rejection of *Spies* v. *United States*, 317 U.S. 492 (1943) by the Third Circuit, in admitted conflict with the Eighth Circuit, makes it desirable for the Court to grant certiorari in this case in order both to settle generally the resulting confusion in the law relating to civil tax penalties and to review specifically the trial, post-trial, and appellate procedures which here resulted in denial of taxpayer's refund claim?

STATUTES INVOLVED

The statutory provisions involved are Sections 6651 and 6653(b) of the Internal Revenue Code of 1954, 68A Stat. 821-822, 26 U.S.C. §§6651 and 6653(b). They are printed in Appendix A, *infra*, p. 9.

STATEMENT

This suit arises out of plaintiffs' claim for refund of 50% tax fraud penalties assessed for the year 1954 pursuant to 26 U.S.C. §6653(b).* The United States District Court had jurisdiction of this case by virtue of 28 U.S.C. §§1340 and 1346(a). An appeal was taken to the United States Court of

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* Mrs. Stoltzfus is involved as a party only because joint returns were filed.

Appeals pursuant to 28 U.S.C. §1291.

The factual background of this case can be stated briefly. After filing returns and paying taxes for 1941 and 1942 and after paying the first installment on his 1943 estimated tax, taxpayer suffered an uninsured fire loss of his business and did not send in his second installment. During the next eight years taxpayer was plagued by financial adversity as reflected in his total income tax liability of $321.04 for the entire period. He was also hampered by an irrational but real fear that drastic consequences in the form of summary actions by government agents would result from his omissions. During this period, as always, taxpayer openly kept complete records of his financial affairs.

In the early 1950's taxpayer made a modest start toward recovery and for 1954, the year in issue in this case, he had a tax liability of $596.50. Thereafter he made efforts to resolve his tax problems and in 1959 he consulted a lawyer. Complete returns and full payment of all tax liabilities soon followed. The taxpayer, his attorneys, and his accountants fully cooperated with the revenue agents who were assigned to the case.

Taxpayer's counsel readily recognized that taxpayer was liable for the 25% failure to file penalties provided for in Section 6651 of the Internal Revenue Code of 1954. However, the government insisted upon the 50% fraud penalty under Section 6653(b). Sitting without a jury the trial judge heard the government's case, and one witness and taxpayer testified in defense. The trial judge then cut short the trial without permitting redirect examination of taxpayer or the testimony of further witnesses on taxpayer's behalf. Instead, the trial judge informally announced to counsel that the government had failed to meet its burden of proving fraud. Before this decision could be reduced to judgment the trial judge died. Taxpayer thereafter agreed to have the case assigned to another judge for decision on the record without prejudice to the later assertion of post-trial motions.

The assigned judge agreed that under the circumstances all of the evidence should be construed most favorably to taxpayer. Nevertheless, in spite of a trial record which contained evidence that taxpayer had always intended to pay his taxes, had maintained excellent records, had lived modestly, had made efforts to resolve his tax difficulties, and had engaged in no attempts to conceal income or assets, the assigned District Court judge somehow concluded that taxpayer was nevertheless liable for a 50 percent fraud penalty.

On the law the assigned District Court ruled in its opinion as follows (264 F. Supp. 824, 827 (E.D. Pa. 1967)):

> ". . . I cannot agree that there should be engrafted upon civil fraud proceedings the criminal fraud requirement of 'affirmative action' consisting of actively deceptive conduct by the taxpayer. See *Spies* v. *United States*, 317 U.S. 492, 498-499, 63 S. Ct. 364, 87 L.ED. 418 (1943), a criminal case, and *First Trust & Savings Bank of Davenport, Iowa* v. *United States*, 206 F. 2d 97, 100 (C.A. 8, 1953), a civil case, and compare the civil case of *Powell v. Granquist*, 252 F. 2d 56 (C.A. 9, 1958). While this Circuit does not appear to have ruled definitively on the question, I think it would not follow the 8th Circuit."

On appeal to the Third Circuit the assigned District Court judge was affirmed, one judge dissenting. The Court agreed that all the evidence should be construed most favorably to taxpayer but it found that taxpayer did not file returns in order to conceal prior years' defalcations. There is no explanation in the majority's opinion as to how such a finding can be reconciled with the facts that 1) taxpayer's problem first arose when he sustained a severe financial loss after previous full compliance with the tax laws, 2) for eight years thereafter he had nothing at all to gain and much to lose by not filing returns, and 3) during the entire period he conducted himself openly with a view to making a full accounting and not with any intent to escape his tax liabilities.

REASONS FOR GRANTING THE WRIT

On the law the majority of the Court of Appeals for the Third Circuit based its affirmance on the proposition that taxpayer's knowledge that he owed taxes was an affirmative indication of fraud. But unlike many other taxpayers in similar situations, here taxpayer never denied that he was aware of his obligations. Indeed, he testified that he always fully intended to meet them. And the Third Circuit's exclusive reliance on the knowledge factor would seem to place it in direct conflict with the Fifth Circuit as well as with the Eighth Circuit:

> "... [T]he argument is utterly lacking in force that a citizen can be convicted of intentional wrongdoing with specific intent to evade his taxes because he elects to use his money ... in preference to turning it over to the Government *even though he knows he owes taxes.*" (Emphasis supplied). *Jones v. C.I.R.*, 259 F. 2d 300 (5th Cir. 1958).

Like the assigned District Court the majority in the Third Circuit Court of Appeals refused to adopt the criminal law standard that the government must prove some affirmative act. Such rejection of the criminal law test in this area of civil tax penalties runs directly counter to the previous practice as summarized by the Fourth Circuit in *Moore* v. *United States*, 360 F. 2d 353, 356 (4th Cir. 1966):

> "... [T]he case-by-case process of construction of the civil and criminal tax provisions has demonstrated that their constituent elements are identical."

To date two cases have cited the *Stoltzfus* case: *Melinder* v. *United States*, 281 F. Supp. 45 (W.D. Okla. 1968) and *Irolla* v. *United States*, 390 F. 2d 951 (Ct. Cls. 1968). In *Melinder* and in the majority opinion in *Irolla* the conflict created by *Stoltzfus* was noted without elaboration. But the dissent in the *Irolla* case demonstrates that the resolution of this conflict is of crucial importance both to taxpayers and to the government in the administration of the income tax laws. And the same dissent fully indicates the error of the

Stoltzfus result in terms of disregard of legislative intent and unfairness to taxpayers (at 963-4):

> "[The government] cites the case of *Stoltzfus* v. *United States,* 264 F. Supp. 824 (E.D. Pa. 1967), in which notice of appeal has been given, as controlling in this case, although it appears to be in conflict with the decision of the Supreme Court in *Spies* v. *United States,* 317 U.S. 492, 63 S. Ct. 364, 87 L.Ed. 418 (1943), and other cases as *Cave* v. *United States,* 159 F. 2d 464 (8th Cir. 1947) cert. denied, 331 U.S. 847, 67 S.Ct. 1732, 91 L.Ed. 1856; *First Trust & Savings Bank* v. *United States, supra,* and other cases cited herein. Defendant argues that the *Stoltzfus* case is correct in holding that in a civil fraud case all the government has to do to prove fraud is to show what it chooses to call an 'affirmative indication' on the part of the taxpayer of the specific fraudulent intent, instead of the 'affirmative action' required by the *Spies* case and the other cases. This appears to be an exercise in semantics, and is much like trying to distinguish between 'Tweedledee' and 'Tweedledum'. There cannot be an 'affirmative indication' without 'affirmative action'. The government would have us believe that by using this illusory formula of 'affirmative indication' a person's fraudulent intent can be determined as easily as his predilection and characteristics can be shown by reading the signs of the zodiac. This places the proof of fraud on a rather nebulous basis, which falls far short of the clear and convincing evidence required by law. An affirmative indication of fraud is a descriptive term which is based on and results from an affirmatve act of fraud. It cannot exist otherwise. The government cannot by such argument reduce its burden of having to prove by clear and convincing evidence an affirmative act of fraud on the part of the taxpayer that shows a specific intent to evade tax.
>
> "The *Stoltzfus* case does not appear to be correctly decided for another reason. The court there held that when a taxpayer knows of his concrete liability to pay taxes and does not file his return and pay them, he intentionally, willfully, and fraudulently evades taxes, in the absence of a valid justification for his conduct. Such a ruling changes the burden of proof from the

government to the taxpayer. No principle is better established in civil fraud cases than that which requires the government to prove by clear and convincing evidence that the taxpayer has a fraudulent intent to evade tax. The *Stoltzfus* case would shift this burden and require the taxpayer in a civil fraud case to prove he did not have a fraudulent intent to evade tax. This is not the law as I understand it.

"Before a taxpayer can be liable for a civil fraud penalty, there must be an affirmative commission of an act of fraud by him. A willful omission to file a return is not enough. The cases distinguished between 'commission' and 'omission'. See *Spies* v. *United States, supra; Cave* v. *United States,* and *First Trust & Savings Bank* v. *United States, supra.* In the last cited case, the court correctly stated the law as follows:

> '* * * But Congress makes the difference on the civil side as it does on the criminal side, between the taxpayer whose deficiencies of tax are due to (or caused by) his *affirmative commission* of fraud and the one whose deficiencies of tax are due to *willful omission* to make return. [sic] *That omission justifies* the addition of 5 per cent *up to 25 per cent* of the deficiencies found against the taxpayer *but does not afford any basis for the addition of 50 per cent* to his deficiencies. *Only the commission of acts of fraud with intent to evade tax* to which "the deficiencies are due" (or which bring about the deficiencies) *affords a basis for the 50 per cent addition to tax.* Id., 206 F. 2d at 100-101. [Emphasis supplied.]' "

The validity of this reasoning is easily recognized. The majority in *Irolla* did not repudiate it. Rather the majority there disagreed with the dissent on the facts of that case. The *Irolla* majority found affirmative acts of fraud consisting of incomplete records, non-disclosure of assets, and an apparent admission by taxpayer that he was never going to file returns. No such affirmative acts are present here. Instead, this case is best summarized by the language of *Edwards* v. *United States,* 375 F. 2d 862, 867 (9th Cir. 1967):

"Evasion and defeat . . . contemplate an escape from

tax and not merely a postponement of disclosure or payment."

"[footnote 6] . . . But here, by tardy filing of a proper return, the tax for the taxable period has not been evaded; its payment has merely been postponed."

CONCLUSION

It is of great importance to tax administration that there be a resolution of the conflict which the Third Circuit in this case admittedly created with the Eighth Circuit and apparently also with the Fourth, Fifth, and Ninth Circuits. Unless action is taken now the *Stoltzfus* case may well destroy the hitherto orderly and parallel development of the law of criminal and civil tax penalties. Furthermore, the creation of this conflict has arisen in the context of questionable procedural circumstances which provide a shaky foundation for such a departure. For these reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

CONVERSE MURDOCH
RICHARD E. POOLE
Wilmington, Delaware
Counsel of Petitioners

October 1968

APPENDIX

APPENDIX A

Statutes Involved

Internal Revenue Code of 1954:

§ 6651. Failure to file tax return

(a) Addition to the tax.—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

(b) Penalty imposed on net amount due.—For purposes of subsection (a), the amount of tax required to be shown on the return shall be reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax and by the amount of any credit against the tax which may be claimed upon the return.

(c) Exception for declarations of estimated tax.—This section shall not apply to any failure to file a declaration of estimated tax required by section 6015 or section 6016. Aug. 16, 1954, c. 736, 68A Stat. 821.

§ 6653. Failure to pay tax

(b) Fraud.—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a

return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

APPENDIX B

Opinions and Judgment Below

DISTRICT COURT'S OPINION AND JUDGMENT FOR DEFENDANT

CHRIS D. STOLTZFUS AND
IRMA H. STOLTZFUS
v.
UNITED STATES.

Civ. A. No. 34343.

March 7, 1967.
264 F. Supp. 824 (E. D. Pa. 1967).

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

JOSEPH S. LORD, III, *District Judge.*

Plaintiff (hereinafter "taxpayer" [1]) sues for the refund of civil fraud penalties imposed for the taxable year 1954 pursuant to Section 6653(b) of the Internal Revenue Code.[2] The case was tried by my late brother Judge Grim (sitting as finder of fact) who died before handing down a decision.

[1] "Taxpayer" refers to Chris Stoltzfus. There is no suggestion in the record that Mrs. Stoltzfus was liable for or that she paid any part of the deficiency assessments. She appears in this case only because joint returns were eventually filed. She alone cannot, of course, recover if her husband acted fraudulently.

[2] "*Fraud.*—If any part of any underpayment * * * of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. * * *"

After his death, the matter was assigned to me, and the parties have stipulated that I may draw the necessary findings of fact and conclusions of law from the present record, without prejudice to the later assertion by either party of post-trial motions.

The parties have also agreed that the burden of proof, specifically the burden of proving fraud, is on the government. See Cirillo v. C.I.R., 314 F. 2d 478, 482 (C.A. 3, 1963). I have determined that the government has sustained this burden by "clear and convincing" evidence, id., and that judgment must be entered for the defendant. In making these findings, I have construed all of the evidence most favorably to the plaintiff. This approach seemed peculiarly well-suited to the adjudication of this case because, although I presided at the criminal trial of Mr. Stoltzfus for willful failure to file tax returns, 26 U.S.C. §7203; Crim. No. 20938 (E. D. Pa. 1962), I have had no fresh opportunity to assess his demeanor credibility or that of any other witness who testified in the present proceedings.

FINDINGS OF FACT

Taxpayer freely concedes that he filed no tax return in 1954. Indeed, he does not dispute the fact that he filed no tax returns for the years 1943 to 1958, although he knew all along that he had an obligation to do so.[3] The record also compels the conclusion that Stoltzfus knew that he was earning taxable income on which taxes should in fact be paid as required by law. Since he was a self-employed entrepreneur, no taxes were ever withheld from his earnings; the taxpayer knew from his own experience in filing returns before his lapses beginning in 1943 that the only way the government got any income tax money from him was when he filed a return and paid the indicated tax. In

[3] I note, and properly so (see Cirillo v. C. I. R., supra, at 482), that the taxpayer has been convicted of willful failure to file returns.

other words, he knew that his failure to file returns redounded to his personal gain while it deprived the government of tax funds lawfully owing to it.

The taxpayer attempts to justify his conduct by explaining that in 1943, his place of business burned down and, burdened with the ensuing loss, he knowingly refrained from submitting the second installment of his estimated tax. After that, he became obsessed with the fear of summary criminal prosecution for his omission. Thus, instead of seeking advice from an attorney, or indeed, from the Internal Revenue Service itself, he simply stopped filing returns, believing that the government would be impeded from the immediate discovery of what he himself supposed to be criminal tax fraud. The taxpayer contends that this evidence establishes that his purpose was not to avoid the payment of taxes, but merely to avoid contemplated criminal penalties for neglecting to pay.

In support of his position, Stoltzfus maintains that he made no attempt to conceal sources of income, and although there is some conflict in the testimony, I will assume that the records kept by the taxpayer, while by no means equivalent to formal "books" which readily established net income, were by and large adequate enough to establish that he did not intentionally falsify financial statements or destroy relevant portions thereof. Finally, although there is again evidence to the contrary,[4] I will assume that after he had been cornered by the Revenue agents, the taxpayer cooperated reasonably well.

DISCUSSION AND CONCLUSIONS OF LAW.

As one leading commentator has noted: "It is not easy to generalize about what constitutes fraud so as to justify the 5 per cent penalty imposed by § 6653(b)." Bittker,

[4] Agent Richman stated that Stoltzfus claimed never to have had more than $1,000 on hand at any time. The facts are otherwise.

Federal Income Estate and Gift Taxation (3d ed. 1964) p. 958. In this Circuit, the general rule in non-filing cases is that the ultimate burden of proof is on the government to show by "clear and convincing" evidence that "the circumstances surrounding the failure to file returns * * * strongly and unequivocally indicate an intention to avoid the payment of taxes. Powell v. Granquist, 9th Cir., 1958, 252 F. 2d 56; cf. Bender v. Commissioner [of Internal Revenue], 7th Cir., 1958, 256 F. 2d 771." Cirillo v. C.I.R. supra, 314 F. 2d at p. 482. While willful failure to file is relevant evidence of fradulent evasion, the burden of proving fraud is not met solely by proof of such failure. "The record must contain some convincing affirmative indication of the required specific intent." Id.

However, I cannot agree that there should be engrafted upon civil fraud proceedings the criminal fraud requirement of "affirmative action" consisting of actively deceptive conduct by the taxpayer. See Spies v. United States, 317 U. S. 492, 498-499, 63 S. Ct. 364, 87 L. Ed. 418 (1943), a criminal case, and First Trust & Savings Bank of Davenport, Iowa v. United States, 206 F. 2d 97, 100 (C. A. 8, 1953), a civil case, and compare the civil case of Powell v. Granquist, 252 F. 2d 56 (C. A. 9, 1958). While this Circuit does not appear to have ruled definitively on the question, I think it would not follow the 8th Circuit. The Tax Court in Cirillo, T. C. Memo. 1951-192 explicitly rejected the contention that the *Spies* interpretation of § 7201, a strictly construed criminal statute,[5] affects civil cases which are governed by the vague reference to "fraud" in § 6653(b). The Tax Court referred to the specific "terminology of attempt" embodied in the criminal statute, a factor which was the fulcrum of the Supreme Court's decision in *Spies*. It held that no "affirmative action" or "willful commission in addition to the willful omissions" (Spies v. United States, supra, 317

[5] "Any person who willfully attempts * * *" to evade taxes.

U. S. at 499, 63 S. Ct. at 368) need by shown in civil suits. This reasoning appears to me to be sound.

Furthermore, when *Cirillo* came before the Court of Appeals, neither party cited *Spies*. However, we must assume that Judge Hastie, who wrote the opinion for the Court, considered the Tax Court's memorandum. Nevertheless, although both *Spies* and *Cirillo* were non-filing cases, and although there was no evidence of "affirmative action" in *Cirillo*, Judge Hastie did not deem it appropriate to refer to *Spies*. The test then, under *Cirillo*, is "affirmative indication," and not "affirmative action."

As applied to the facts of this case, there is no question that *Cirillo* requires a judgment for the government. Indeed, the taxpayer in *Cirillo* had a much more appealing excuse for nonpayment than Stoltzfus: the bulk of his income for many years was subject to withholding taxes and he asserted that although he knew he should have filed returns, he honestly did not believe any additional taxes were owing. In those years where this belief failed to conform to the fact of liability, the Court of Appeals, on a record no more persuasive to the government's case than that before me, had no difficulty in sustaining the Tax Court's finding of fraud, even absent the slightest indication that the taxpayer had actively concealed sources of income or falsely fabricated contemplated deductions. Referring to Cirillo's avowedly innocent attitude toward the extent of his tax liability, the Court concluded:

> "* * * His disingenuous avoidance of accurate knowledge when the need for such knowledge must have been apparent was in itself a substantial indication of fraudulent intent. * * *" 314 F. 2d at p. 483.

Stoltzfus, like Cirillo, knew of his duty to file returns and of his general obligation to pay taxes. Unlike Cirillo, he concededly realized that he had a tax liability which was neither speculative nor insubstantial. Under the circumstances, his

belief that by becoming as inconspicuous as possible he could escape governmental detection cannot be interposed as a defense. Indeed, it serves to augment the proof of evil motive which the taxpayer protests is lacking. The intentional avoidance of taxes to conceal conduct which the taxpayer believed to be criminal by no stretch of the imagination reflects an innocent purpose. If Stoltzfus' arguments were to prevail, a hunted fugitive from justice could safely refuse to pay his taxes on the ground that the government would then be able to capture him by tracing his returns.

The non-filing taxpayer who knows of his *concrete* liability to pay taxes (and not merely his obligation to file returns or his general duty to pay such taxes as those returns might indicate are owing) intentionally, willfully, and fraudulently evades taxes, within the meaning of Section 6653(b), in the absence of a valid justification for his conduct. In this case, the justification suggested—fear of criminal reprisals—must be rejected as a matter of law for it is not even colorably valid. The taxpayer would have this court believe that because the ultimate "purpose" of the tax evasion was not to materially benefit him, but to preclude his conviction on self-conceived criminal charges, the specific intent to defraud is absent. There are two reasons why this contention lacks merit.

First, the statutory reference to fraud does not require a motive of self-enrichment.[6] It requires only a purpose to evade taxes. One who in knowing violation of the law makes no attempt to pay admitted tax liabilities and asserts no

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[6] If such were the case, a modern day Robin Hood who gave his intended tax monies to poorer countries he thought could better employ them could not be considered liable for tax evasion. See Powell v. Granquist, 252 F. 2d 56 (C. A. 9, 1958), where the taxpayer's sole justification for failing to file returns and pay taxes was his objection to "the way the government was wasting money." The court dismissed this frivolous contention with the observation that "for a taxpayer to be knowingly and willfully defiant, withholding and dedicated to a plan of nonpayment of taxes for which he knows he is liable * * *" constitutes fraud. 252 F. 2d at p. 60.

colorably valid excuse can fairly be said to have no other purpose than that of evasion.

Secondly, acceptance in any manner of the taxpayer's avowed primary "purpose" in failing to file or pay, avoidance of criminal prosecution for tax evasion, would thwart the operation of the revenue laws, which depend in large measure upon voluntary compliance. A taxpayer is expected to police his own records, to report promptly and in full his taxable income, and to pay the assessments which he himself has initially determined to be owning. Stoltzfus cannot justify his tax evasion by claiming that to have paid would have invited criminal prosecution for the very acts of willful defiance in which he was engaged. Such an interpretation would vitiate the deterrent effectiveness of all sanctions for tax evasion by making concealment of that evasion a justification for the evasion itself, exonerating the taxpayer from civil and criminal penalties.

I am satisfied that "the circumstances surrounding the failure to file returns * * * strongly and unequivocally indicate an intention to avoid the payment of taxes." *Cirillo v. C. I. R.*, supra, 314 F. 2d at p. 482.

Judgment will be entered for the defendant. It is so ordered.

DISTRICT COURT'S OPINION AND ORDER DENYING NEW TRIAL

MEMORANDUM.

JOSEPH S. LORD, III, *J.* January 10, 1968.

This suit for refund of civil fraud penalties[1] was decided by me adversely to the plaintiff[2] on the record made before my late brother, Judge Allan K. Grim. *Stoltzfus v. United States,* 264 F. Supp. 824 (E. D. Pa. 1967). The stipulation that I might decide the case on Judge Grim's record was "without prejudice to the later assertion by either party of post-trial motions." 264 F. Supp. at p. 826. Plaintiff now moves for a new trial alleging as error that the trial judge (1) refused to premit re-direct examination of plaintiff; and (2) refused to permit plaintiff to call additional witnesses. The motion will be denied for these reasons:

1. There is not the slightest indication on the record, either by offer of proof at the trial or by affidavit filed thereafter, of what the re-direct examination would have covered or what the testimony of the witnesses would have been. "There was no offer of proof and what would have been * * * [the] testimony is left to the realm of conjecture and cannot serve as a basis for setting aside the verdict * * * and granting a new trial." *Tweith v. Duluth, M. & I. R. Ry. Co.,* 66 F. Supp. 427, 431 (Minn. 1946).

2. Plaintiff asserts in his brief (a) that he was prejudiced because on re-direct he would have explained his inability to identify his wife's handwriting and (b) that "[n]o one was permitted to verify taxpayer's intentions to pay his taxes, nor to emphasize the extent of his cooperation once his situation was made known to the government."

[1] Imposed under 26 U. S. C. A. (I. R. C. 1954) § 6653(b).
[2] "Plaintiff" herein refers only to the husband-plaintiff.

Of course, statements in counsel's brief are not part of the record. *In the Matter of H. Ernest Strubbe,* 347 F. 2d 217, 218 (C. A. 3, 1965); *United States v. Beard,* 381 F. 2d 329, 331 (C. A. 6, 1967). However, even if these assertions were true, plaintiff would not be entitled to a new trial.

As to (a), plaintiff's argument is at best fatuous and at worst disingenuous. It completely ignores the fact that this question arose pointedly during the *direct* examination:

> "THE COURT: Let me ask this again: How long have you been married?
>
> "THE WITNESS: She wouldn't like this, your Honor—
>
> "THE COURT: No. I want to know because it seems inconceivable to me a man married as you would not know your wife's handwriting."

The fullest opportunity to explain what counsel now seems to regard as an apparently curious aberration on plaintiff's part was sharply presented at that very moment of the trial. This was the time for an explanation, if one existed and was thought necessary. Surely, having squarely raised the question without answer, the trial judge can scarcely be faulted for refusing re-direct, at least without an offer of proof.

In any event, the only possible prejudice of which counsel can conceive is that this lack of explanation may have affected the court's appraisal of plaintiff's credibility. However, not only did I attach no weight whatsoever to this, but I "construed all of the evidence most favorably to the plaintiff." 264 F. Supp. at p. 826. The findings completely accepted plaintiff's direct testimony and any evidence to the contrary was rejected. See 264 F. Supp. at p. 826, n. 4.

As to (b), such testimony would avail plaintiff nothing. No returns were filed for the years 1943 through 1958. The fraud here involved was for the year 1954. Certainly, some vague intention to pay sometime in the unidentified future

which took form only after plaintiff's sixteen years of dereliction would not undo the fraud that had already attached in connection with the 1954 taxes. *Cf. Cirillo v. C.I.R.*, 314 F. 2d 478 (C. A. 3, 1963). And I have already explicitly assumed in my adjudication that, after discovery, "the taxpayer cooperated reasonably well."

Thus, even accepting the belated and unsworn statements in plaintiff's brief, it is plain that if there was any error by the trial judge, it was in no way prejudicial to plaintiff and does not warrant a new trial. F. R. Civ. P. 61.

Plaintiffs' motion for a new trial will be DENIED. It is so ORDERED.

By THE COURT:

JOSEPH S. LORD, III, *J.*

OPINION AND JUDGMENT OF AFFIRMANCE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 16774 and 17124

CHRIS D. STOLTZFUS AND IRMA H. STOLTZFUS,
Appellants,

v.

UNITED STATES OF AMERICA

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 7, 1968
Before McLAUGHLIN, STALEY and SEITZ, *Circuit Judges.*

OPINION OF THE COURT
(Filed July 31, 1968)

SEITZ, *Circuit Judge.*

This is an appeal from a judgment of the district court denying appellant's ("taxpayer")[1] request for a refund of civil fraud penalties imposed for the taxable year 1954 pursuant to Section 6653(b) of the Internal Revenue Code of 1954, 26 U. S. C. A. § 6653(b). The district court, sitting without a jury, determined that the government had sustained its burden of proving fraud and denied taxpayers the relief requested.[2] 264 F. Supp. 824 (E.D. Pa. 1967).[3]

We briefly narrate pertinent portions of the evidence as stipulated by the parties or adduced by the government

[1] The real party to this suit is Mr. Stoltzfus. Mrs. Stoltzfus is named as a party solely because a joint return was filed.

[2] This case was tried before a judge who died before entering judgment. The parties stipulated that subject to objections contained in the record, the case should be decided by an assigned judge on the record earlier made. Such judge construed all the evidence most favorably to the plaintiff because he had not observed the witnesses. In our review of the record, we adopt the same approach.

[3] Plaintiff also appeals the judgment denying a new trial.

in its case and not challenged by the taxpayer in his testimony.

Taxpayer was educated through the eighth grade. As a teenager he worked on his father's farm and later held odd jobs in automobile garage and repair shops until he went into business for himself. From 1944 through 1954 taxpayer was self-employed in a business consisting of crop spraying and dusting by airplane. In the furtherance of such business taxpayer directly engaged in negotiations with various federal and local governmental agencies concerning the purchase of airplanes. He also bid on and negotiated contracts for crop spraying and dusting. In 1954 taxpayer entered the airplane parts business.

The taxpayer filed income tax returns for the taxable years 1941 and 1942 and paid a small amount of tax. For the taxable year 1943, he filed an estimated tax return and paid the first installment due thereon. From 1943 through 1958 the taxpayer, although admittedly receiving income from various sources, filed no tax returns. Late returns for these years were ultimately filed in 1959 and 1960.[4] The

[4] They show, inter alia, the following:

Year	*Gross Receipts From Business*	*Total Gross Income*	*Tax Due Per Return*
1943	Net worth method used	$ 2,177.17	$ 56.04
1944	Net worth method used	1,842.85	35.00
1945	Net worth method used	3,155.60	142.00
1946	Net worth method used	(2,559.88)	—0—
1947	Net worth method used	2,553.98	—0—
1948	Net worth method used	3,922.23	88.00
1949	Net worth method used	1,273.18	—0—
1950	Net worth method used	1,374.20	—0—
1951	Net worth method used	8,097.42	752.28
1952	Net worth method used	12,232.96	1,781.70
1953	Net worth method used	11,119.80	1,354.36
1954	$ 71,930.04	6,925.83	596.50
	2,596.49—Farm		
1955	287,437.65	48,336.08	16,697.73
	1,602.79—Farm		
1956	422,489.50	101,842.56	50,838.59
	—0— —Farm		
1957	443,071.92	19,609.82	3,477.95
	—0— —Farm		
1958	201,147.39	(33,544.60)	—0—
	—0— —Farm		

state of the record does not permit a finding as to why taxpayer finally filed returns. The taxes due were subsequently paid with penalties and interest. Taxpayer then filed a timely claim for refund of the fraud penalty paid for the taxable year 1954. The District Director of Internal Revenue disallowed the claim in full. This action in the district court followed.[5]

We first note certain pertinent legal principles. "Fraud," as that term is used in the statutory provisions authorizing the imposition of penalties upon a taxpayer when "* * * any part of an underpayment of tax required to be shown on a return is due to fraud, * * *" means intentional wrongdoing on the part of a tax payer motivated by a specific purpose to evade a tax known or believed to be owing. Powell v. Granquist, 252 F. 2d 56 (9th Cir. 1958). Even though a timely return has not been filed, a taxpayer may be found to have fraudulently intended to avoid taxes. Powell v. Granquist, above. The burden of proving fraud when the taxpayer, as in this case, is suing for a refund, rests upon the government. Armstrong v. United States, 354 F. 2d 274 (Ct. Cl. 1965). To sustain this burden the government must produce "* * * some convincing affirmative indication of the required specific intent." Cirillo v. C. I. R., 314 F. 2d 478, 482 (3rd Cir. 1963). This burden may be met by circumstantial evidence. Powell v. Granquist, above. Although the proven failure of a taxpayer to file returns for an extended period of time is not enough, in and of itself, to justify the imposition of the fraud penalty, it is persuasive evidence of an intent to defraud the government. Cirillo v. C.I.R., above; Powell v. Granquist, above.

We turn to an evaluation of the undisputed evidence

---

[5] In 1961 an Information was filed by the United States charging taxpayer with the misdemeanor of willful failure to file income tax returns for 1955, 196 and 1957. A jury rendered a verdict of guilty on all three years. Although no income tax returns had been filed for previous years beginning with 1943, the statute of limitations prevented prosecution relative thereto.

in light of these legal principles. The evidence concerning the entire period of default (1943-1958) was relevant to taxpayer's right to recover the fraud penalties imposed and paid for in 1954. The government's uncontroverted evidence may be summarized as follows:

Taxpayer, although limited in formal education, had extensive business experience. His business activities caused him to be directly engaged in substantial negotiations with federal and local governments leading to contracts for crop dusting and spraying. These contracts were entered into by the taxpayer without employing an attorney. They involved large sums of money and warrant an inference that a keen awareness of business and financial matters was demanded. Further, taxpayer was aware of his obligation to file returns, report his income and pay taxes. For 1941 and 1942 he timely filed his returns, and he also filed a 1943 estimated tax return on which he paid one installment. From 1943-1958 he failed to file returns. His total gross income, as ultimately reported on returns filed for this period, dictates not only an inference that taxpayer knew at the time that he was obligated to file a return for 1954, but also that he knew he owed taxes for that year. Certainly the fact finder was entitled to so conclude. The material contained in his tax return, as ultimately filed for 1954, when considered with the other uncontroverted matter in the record, fully discharged the government's quantitative and qualitative burden of creating an issue of fact as to whether the taxpayer was chargeable with such fraud under the statute for the year 1954. The "convincing affirmative indication" is found in the government's showing that the taxpayer had no contemporaneous reasonable basis for believing that taxes were not owed.[6]

We look now to the taxpayer's evidence to determine whether it so diluted the government's case that the matter

[6] Cf. Cirillo v. C. I. R., 314 F.2d 478,483 (3rd Cir. 1963). We do not understand that the citation of First Trust & Savings Bank v. U. S. 206 F.2d 97 (8th Cir. 1953), in *Cirillo* was intended to be an adoption of the criminal law standard that the government must prove an affirmative "act."

was no longer proper for decision on a factual basis.

To justify his failure to file for the many years involved, the taxpayer testified that his failure to pay the second installment on his 1943 estimated tax was precipitated by financial adversity, and his continued failure to file was prolonged by ignorance and fear of what he called "summary criminal prosecution." Taxpayer argues that these factors, plus the adequacy of his records and his ultimate cooperation with revenue authorities, as found by the district court, fully verify his own statement that he intended to eventually file tax returns for the years in question. We disagree. His statement that one of the reasons for his continued failure to file returns was fear of criminal prosecution was in itself an admission that he did not file in order to conceal his prior years defalcations. See Fred N. Acker, 26 T. C. 107 (1956). By not filing a return in each year subsequent to 1943, taxpayer attempted to conceal his failure to file for the prior years. We fail to see how such conduct indicates an innocent state of mind. Quite to the contrary, we find such conduct is some evidence of an intent to fraudulently avoid paying taxes knowingly due. In these premises, the taxpayer's testimony, presumably accepted, that throughout the entire period he intended to file returns did not dilute the convincing proof of fraud adduced by the government.

We are satisfied that the required evidentiary showing of the government was reinforced rather than weakened by the taxpayer's own evidence. The district court, as the fact finder, was therefore fully warranted in concluding that the government sustained its burden of proving fraud. And this is so even if we put aside the "clearly erroneous" review standard because the fact finder here did not see and hear the witnesses.

Taxpayer argues further that the district court erred in refusing to grant his motion for a new trial. This motion alleged as error the trial judge's refusal to permit re-direct examination of the taxpayer and his refusal to permit the

taxpayer to call additional witnesses. The record shows that the taxpayer was offered more than a full opportunity to adduce testimony and present evidence. Even so, if we were convinced that the court's closing of the case might have worked any material prejudice to the taxpayer we would reverse. However, the approach taken by the judge who decided this case below indicates that the taxpayer got the "benefit" of all relevant disputed matters. There is no suggestion that further evidence would have challenged any of the undisputed facts relied upon by the district court and by us in deciding this case. We think a new trial was therefore correctly denied.

The judgments of the district court will be affirmed.

Judge McLaughlin dissents and thinks that the case should be remanded to the District Court for a new trial on the merits.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 690

CHRIS D. STOLTZFUS AND IRMA H. STOLTZFUS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21–26) is reported at 398 F. 2d 1002. The opinion of the district court (Pet. 11–17) is reported at 264 F. Supp. 824. The district court's memorandum and order denying new trial (Pet. 18–20) has not been reported.

JURISDICTION

The opinion of the court of appeals was filed on July 31, 1968. (Pet. 21.) Petition for rehearing was

denied on September 26, 1968. The petition for certiorari was filed on October 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court correctly found that petitioners' tax deficiencies were due to fraud within the meaning of Section 6653(b) of the Internal Revenue Code of 1954, concerning civil fraud penalties.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 6651. FAILURE TO FILE TAX RETURN.
>
> (a) *Addition to the Tax.*—In case of failure to file any return required under authority of subchapter A of chapter 61 (other than part III thereof), of subchapter A of chapter 51 (relating to distilled spirits, wines, and beer), or of subchapter A of chapter 52 (relating to tobacco, cigars, cigarettes, and cigarette papers and tubes), or of subchapter A of chapter 53 (relating to machine guns and certain other firearms), on the date prescribed therefor (determined with regard to any extension of time for filing), unless it is shown that such failure is due to reasonable cause and not due to willful neglect, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 per-

cent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate.

* * * * *

SEC. 6653. FAILURE TO PAY TAX.

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

STATEMENT

Petitioners sued in the district court to recover a 50 percent civil fraud penalty assessed under Section 6653(b) of the Internal Revenue Code of 1954 upon 1954 income tax admittedly owed but not paid until the taxpayer [1] belatedly filed a 1954 return on or about October 30, 1959. (R. 9a–11a, 104a; Supp. R. 1b–8b.) [2] The district court concluded that the tax deficiency was "due to fraud" within the meaning of

[1] The term "taxpayer" will be used to refer to petitioner Chris D. Stoltzfus. His wife, also a petitioner, is involved only because of the filing of a joint income tax return.

[2] "R." refers to the appendix to petitioners' brief in the court of appeals. "Supp. R." refers to the appendix to the government's brief in that court.

Section 6653(b) and sustained the penalty.[3] (Pet. 11–17.)

The taxpayer testified that as a result of a business calamity he had been unable to pay $26.43 which he owed as the second installment of his estimated 1943 income tax, that he then regarded himself as a tax dodger and, fearing what would happen if the fact became known, filed no returns and paid no tax for about 16 years thereafter. He did not seek legal advice during all that period. (R. 50a–56a, 60a–64a, 89a; Supp. R. 77b.)

In June and July, 1959, a revenue officer served a levy on the taxpayer, as his brother's employer, to collect the brother's tax. At some time during the summer of 1959, the taxpayer finally consulted an attorney concerning his own income taxes.[4] (Supp. R. 13b–16b, 68b–70b.) He subsequently retained an accountant, who prepared returns for the back years which were filed in October 1959 and January 1960. The accountant prepared the returns for the years 1943 through 1953 by the net worth method, relying on the

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[3] The judge who heard the evidence died before rendering a decision, and by stipulation of the parties another judge decided the case on the written record (R. 103a). The second judge stated that he had "construed all of the evidence most favorably to the plaintiff" because, although he had presided at the taxpayer's prior criminal trial, he did not have in this case a "fresh opportunity to assess" the credibility of the witness. (Pet. 12.)

[4] In his brief below, at p. 6 n. 4, the taxpayer was "willing to assume [for purposes of that appeal] that the government's investigation provided the final stimulus * * * to overcome his previous inability to consult an attorney."

taxpayer's memory for various costs. The later returns were based on books which the accountant constructed from bank statements, cancelled checks, and a sales book, with accurate results in his opinion.[5] (Supp. R. 42b–51b.)

The taxpayer testified that he had kept good records so that he would have them "when the time came that I could go in on voluntary disclosure", but that in 1956 he learned "that voluntary disclosure was no longer recognized." (R. 61a–63a.) In 1960 he told an investigating agent that only his wife maintained his business records because he did not want anyone else to know that he had not filed returns. (Supp. R. 54b, 56b.) A pilot he employed at an earlier time testified that the taxpayer refused to give him a "W–2" form showing his earnings record. (Supp. R. 20b–34b.)

The district court concluded that taxpayer's "belief that by becoming as inconspicuous as possible he could escape governmental detection cannot be interposed as a defense", and that " 'the circumstances surrounding the failure to file returns * * * strongly and unequivocally indicate an intention to avoid the

[5] The returns finally filed in 1959 and 1960 reported no tax or small amounts of tax for the years through 1950, and amounts of tax for later years as follows (Supp. R. 12b; Exs. G–3 through G–18):

1951	$752.28
1952	1,781.70
1953	1,354.36
1954	596.50
1955	16,697.73
1956	50,838.59

payment of taxes.' *Cirillo* v. *C.I.R.*, supra, 314 F. 2d at p. 482." (Pet. 15–16, 17.) The court subsequently denied the taxpayer's motion for a new trial.

ARGUMENT

Petitioners erroneously suggest that there is a significant conflict among the circuits as to whether the "affirmative action" required to establish guilt of the crime of tax evasion (*Spies* v. *United States*, 317 U.S. 492, 498) is also necessary to establish "fraud" for purposes of the 50 percent civil penalty provided in Section 6653(b) of the Internal Revenue Code of 1954 for "underpayment * * * of tax * * * due to fraud."

The problem in *Spies* v. *United States, supra,* was to distinguish the *felony* of willful attempt to evade tax, proscribed by Section 145(b) of the 1939 Code, from the *misdemeanor* of willful failure to file a return or to pay a tax, proscribed by Section 145(a).[6] This Court found the necessary distinction in the word "attempt," used only in the felony statute. It held that a simple omission to file returns was not by itself an attempt to evade tax, but that some additional "affirmative action" to conceal the amount or existence of liability must be shown, such as falsification of books or maintenance of secret accounts. The record does not show the taxpayer to have engaged in such activities.

The suggested requirement of "affirmative action"

[6] These provisions now appear as Sections 7201 and 7203, respectively, of the 1954 Code.

is not applicable to the civil statute at issue here. In Section 6653(b), the operative concept is not "attempt to evade" but "underpayment * * * due to fraud." The lesser civil penalty provision, Section 6651(a), imposes a maximum penalty of 25 percent "[i]n case of failure to file any return * * *, unless it is shown that such failure is due to reasonable cause and not due to willful neglect." This penalty may be imposed even in cases where the taxpayer honestly believed that he owed no tax but failed to exercise ordinary care and prudence to find out whether his belief was correct. *Henningsen* v. *Commissioner,* 26 T.C. 528, affirmed, 243 F. 2d 954 (C.A. 4); see also 10 Mertens, *Law of Federal Income Taxation* (1964 Rev.), Section 55.23.

While the two criminal sections both relate to willful wrongdoing, the two civil penalty sections distinguish between willful underpayment ("fraud") and mere unreasonable nondisclosure. The civil sections make the taxpayer's intent the distinguishing feature, unlike the criminal sections which must be interpreted (as in *Spies*) as covering different types of intentional nondisclosure. Thus, the court of appeals here properly made the test of "fraud" in the more severe penalty section whether or not there is "*intentional wrongdoing * * * motivated by a specific purpose to evade a tax* known or *believed* to be owing" and held that there must be convincing proof of such a specific purpose (Pet. 23; emphasis supplied.) And as the Ninth Circuit noted in *Powell* v. *Granquist,* 252 F.

2d 56, 60–61, this intent to defraud may be present whether or not there is "affirmative action."[7]

Petitioners mistakenly assert (Pet. 5) that the finding of fraud involved "exclusive reliance on the knowledge factor." In addition to the proof of failure to file for sixteen years despite proven knowledge of a duty to file returns, the court considered the taxpayer's testimony (Pet. 25) that he deliberately chose to conceal his tax indebtedness by filing no returns and by having his wife do his bookkeeping. The court said (Pet. 25): "We fail to see how such conduct indicates an innocent state of mind."

Only one case, *First Trust & Savings Bank* v. *United States,* 206 F. 2d 97 (C.A. 8), has found the *Spies* requirement applicable to a case of civil fraud. That case, however, is *sui generis*; it involved a 71-year-old taxpayer who had never filed an income tax return and whose professed ignorance of his duties under the tax laws was not disproved. Other cases reaching the question have adopted the standard used by the court here. *Powell* v. *Granquist,* 252 F. 2d 56 (C.A. 9); *Jones* v. *Commissioner,* 259 F. 2d 300, 303 (C.A. 5); and see the Tax Court cases cited at n. 7.

[7] The Tax Court has uniformly held that for the 50 percent civil fraud penalty there is no requirement of affirmative action. See *Bennett* v. *Commission,* 30 T.C. 114, 122–123; *Acker* v. *Commissioner,* 26 T.C. 107; *Finnorn* v. *Commissioner,* decided February 8, 1960 (P–H Memo T.C., par. 60,014); *Ripperger* v. *Commissioner,* decided February 28, 1961 (P–H Memo T.C., par. 61,058); *Trotte* v. *Commissioner,* decided June 16, 1966 (P–H Memo T.C., par. 66,129); *Cirillo* v. *Commissioner,* decided June 29, 1961 (20 T.C.M. 956), affirmed in relevant part, reversed in part, 314 F. 2d 478 (C.A. 3).

The conflict which petitioners claim with *Jones* is simply a conflict on the facts: the court there was unable to find a fraudulent intent, since the taxpayer's failure to pay taxes was based upon the fact that the government had long failed to pay him a much greater sum which it justly owed. In the present case, on the other hand, taxpayer made it clear by his testimony that no mere temporary delay was involved, that he never intended to pay unless he found that he could safely reveal his existence, and that he let year after year go by without consulting a lawyer to learn whether he could safely file returns.

Finally, neither *Moore* v. *United States,* 360 F. 2d 353 (C.A. 4), nor *Irolla* v. *United States,* 390 F. 2d 951 (Ct. Cls.), reach the issue in question. *Moore* held that conviction of the felony of attempt to evade tax would be available collaterally to prove fraud; it does not follow, and *Moore* does not state, that to prove fraud conduct amounting to the felony must be shown. The *Irolla* majority found fraud on facts including one affirmative misstatement, but otherwise rather like those of the present case, and then went on to state that in view of *Powell* v. *Granquist, supra,* and subsequent cases, "it will be seen that even if plaintiff's counsel had knocked the [single affirmative misstatement] out of the case, he would not have been assured of success." 390 F. 2d at 956.[8]

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[8] *Edwards* v. *United States*, 375 F. 2d 862 (C.A. 9), cited in the petition at pp. 7–8, is a criminal case, and hence irrelevant here.

CONCLUSION

There is no significant conflict of authority and the decision below is correct. Accordingly the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
MITCHELL ROGOVIN,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

NOVEMBER, 1968.

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